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COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 38

DOMINIC PALMER,

Petitioner,

vs.

P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, PITTSBURGH, PA.,

Respondent

ERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

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INDEX

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	8
Summary of argument	9
Argument	10
I. The failure to provide counsel and the sentence on plea of guilty, under all the circumstances of this case, denied petitioner due process of law. *Uveges* v. *Pennsylvania*, 335 U. S. 437 is controlling	10
II. Palmer's youth, ignorance and mental deficiency rendered him incapable of adequately defending a serious criminal charge; trial without counsel was "so apt to result in injustice as to be fundamentally unfair"	12
III. The robbery charges which Palmer faced were so serious and complex as to make assistance of counsel a constitutional requisite of fair trial	18
IV. The circumstances of Palmer's trial demonstrate actual prejudice due to lack of counsel	24
Conclusion	29
Appendix	30

Citations

Cases:

Agoston v. *Pennsylvania*, 340 U. S. 844	25
Betts v. *Brady*, 316 U. S. 455	11, 13, 29
Boyle's License, 190 Pa. 577, 42 Atl. 1117	7
Bute v. *Illinois*, 333 U. S. 640	11, 12, 13, 18, 23, 24, 26, 27

Page

Canizio v. *New York*, 327 U. S. 82 ..... 13, 23
Carter v. *Illinois*, 329 U. S. 173 ..... 12, 13, 23, 24, 27, 28
Cavalucci v. *Smith*, 154 Pa. Super. 613, 36 A. 2d 732 21
Cole v. *Arkansas*, 333 U. S. 196 24
Commonwealth v. *Calhoun*, 238 Pa. 474, 86 Atl. 472 23
Commonwealth v. *Caulfield*, 211 Pa. 644, 61 Atl. 243 7
Commonwealth v. *Fisher*, 213 Pa. 48, 62 Atl. 198 16
Commonwealth v. *Gardner*, 297 Pa. 498, 147 Atl. 527 7
Commonwealth v. *Gettis*, 166 Pa. Super. 515, 72 A. 2d 619 21
Commonwealth ex rel. McGlinn v. *Smith*, 344 Pa. 41, 24 A. 2d 1 8
Commonwealth v. *Mosler*, 4 Pa. 264 23
Commonwealth ex rel. Penland v. *Ashe*, 341 Pa. 337, 19 A. 2d 464 8
Commonwealth v. *Schroeder*, 302 Pa. 1, 152 Atl. 835 23
Commonwealth ex rel. Sheeler v. *Burke*, 367 Pa. 152, 79 A. 2d 654 25
Commonwealth ex rel. Swisher v. *Ashe*, 145 Pa. Super. 454, 21 A. 2d 479 21
Delaney v. *State*, 164 Tenn. 432, 51 S. W. 2d 485 20
De Meerleer v. *Michigan*, 329 U. S. 663 ..... 12, 27, 28
Foster v. *Illinois*, 332 U. S. 134 ..... 13, 27, 29
Gebardi v. *United States*, 287 U. S. 112 20
Gibbs v. *Burke*, 337 U. S. 773 ..... 8, 12, 13, 14, 17, 18, 27
Gryger v. *Burke*, 334 U. S. 728 ..... 7, 13
Hawk v. *Olson*, 326 U. S. 271 ..... 15, 18, 26, 29
House v. *Mayo*, 324 U. S. 42 ..... 12, 26
Johnson v. *Pennsylvania*, 340 U. S. 881 25
Kercheval v. *United States*, 274 U. S. 220 29
Luitze v. *State*, 204 Wis. 78, 234 N. W. 382 19
Marino v. *Ragen*, 332 U. S. 561 12
People v. *Sylva*, 143 Calif. 62, 76 Pac. 814 20
Powell v. *Alabama*, 287 U. S. 45 ..... 12, 28
Price v. *United States*, 156 Fed. 950 20
Quicksall v. *Michigan*, 339 U. S. 660 ..... 24, 27
Rice v. *Olson*, 324 U. S. 786 ..... 15, 18
Smith v. *O'Grady*, 312 U. S. 329 ..... 15, 24, 26, 28
Tomkins v. *Missouri*, 323 U. S. 485 14
Townsend v. *Burke*, 334 U. S. 736 ..... 7, 17, 23

	Page
Tumey v. *Ohio*, 273 U. S. 510	7
Turner v. *Pennsylvania*, 338 U. S. 62	25
Uveges v. *Pennsylvania*, 335 U. S. 437	7, 8, 10, 11, 13, 18
Von Moltke v. *Gillies*, 332 U. S. 708	18, 20, 23, 24, 27, 29
Wade v. *Mayo*, 334 U. S. 672	12, 17, 18
Walker v. *Johnson*, 312 U. S. 275	15
Williams v. *Kaiser*, 323 U. S. 471	7, 15, 18

Statutes:

Act of June 15, 1939, 11 Purd. Pa. Stat. Ann. (1949 Supp.) Secs. 243, 269-202(f)	17
Pennsylvania Juvenile Court Act of 1903, 11 Purd. Pa. Stat. Ann. (1930) Secs. 71 et seq. and 17 Purd. Pa. Stat. Ann. (1930) Sec. 653	16
Pennsylvania Mental Health Act of 1923, 50 Purd. Pa. Stat. Ann (1931) Sec. 48	28
Pennsylvania Penal Code of 1860, 18 Purd. Pa. Stat. Ann. (1930):	
Sec. 2223 (murder in the second degree)	18
Sec. 2261 (rape)	19
Sec. 2891 (simple robbery)	19
Sec. 2892 (aggravated robbery)	18
Sec. 3041 (burglary)	19
Sec. 3741 (preserving common law crimes)	21
Pennsylvania Penal Code of 1939, 18 Purd. Pa. Stat. Ann. (1945), Sec. 5101 (preserving common law crimes)	21

Other Authorities:

Encyclopaedia Britannica (14th ed.), Vol. 12	14
Louttit, Clinical Psychology (1936)	14
Michael and Wechsler, Criminal Law and Its Administration (1940), chapter V	21
Noyes, Modern Clinical Psychiatry (1948)	14
Sutherland, Principles of Criminology (1947 ed.), chapter 17	16
Stern and Gressman, Supreme Court Practice (1950)	7
Wolfson and Kurland, Jurisdiction of the Supreme Court (1951)	7

SUPREME COURT OF THE UNITED STATES

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No. 38

DOMINIC PALMER,

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vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, PITTSBURGH, PA.,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

Opinions Below

The Supreme Court of Pennsylvania did not file an opinion. Its order refusing to allow an appeal from the decision of the Superior Court of Pennsylvania is printed at R. 30. The Superior Court of Pennsylvania had affirmed the judgment of the Court of Common Pleas of Allegheny County, dismissing Palmer's petition for habeas corpus. The per curiam opinion of the Superior Court appears at 167 Pa. Super. 88, 74 A. 2d 725 (1950), and is reproduced at R. 14.

Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U. S. Code, Secs. 1254(a) and 1257(3), to review the final judgment of the Supreme Court of Pennsylvania rejecting petitioner's claim that he is imprisoned in violation of the due process clause of the Fourteenth Amendment. Petitioner's motion for leave to proceed *in forma pauperis* and his petition for certiorari were granted on April 30, 1951 (R. 31).

Questions Presented

1. May a state court, consistently with the Fourteenth Amendment, sentence a 21 year-old defendant to 10-30 years imprisonment on indictments for armed robbery, without providing or offering him counsel, where:

(a) the defendant had been almost continually confined in mental and correctional institutions between the ages of 8 and 21;

(b) the indictments were not read or explained to the defendant;

(c) the recorded plea of guilty was tendered by the defendant under the misapprehension, resulting from police misrepresentations, that the charge was breaking and entering a store, an offense entirely unrelated to the crimes charged in the indictments; and

(d) the presumption of prejudice from denial of counsel is confirmed by the circumstances of defendant's trial and by the acquittal of his codefendants who did not plead guilty?

2. Does a state's post-conviction review procedure meet the test of Federal due process, if:

(a) it denies a hearing to determine whether an uncounseled twenty-one-year-old mentally deficient defendant

understood the charges to which he pleaded guilty; and

(b) it treats an endorsement on an indictment by a court clerk, to the effect that the named defendant pleaded guilty, as an incontrovertible record that such defendant understandingly pleaded guilty to the charge specified in the indictment.

Statute Involved

The robbery statutes in force in Pennsylvania at the time of petitioner's guilty plea are reproduced in the Appendix, p. 30.

Statement

Petitioner, Dominic Palmer, now forty-one years old, is serving the second of two consecutive sentences for aggravated robbery imposed upon him by the Court of Oyer and Terminer of Allegheny County, Pennsylvania, on February 18, 1931, upon a plea of guilty. Palmer received a sentence of five to fifteen years and a fine of 6¼ cents under indictment No. 24 of January Term, 1931 (the Rosella robbery), and a like sentence under indictment No. 23 of the same term (the Brinn robbery) (R. 5, 21, 23). It is conceded that Palmer neither had nor was offered counsel when the plea of guilty was entered. The circumstances bearing upon the propriety of accepting that plea from the defendant are as follows, the facts stated being taken from the undenied averments of the petition for habeas corpus or from the answers thereto filed by the warden and the district attorney, except as otherwise indicated.

Petitioner's Background. (R. 5-6) Petitioner was born December 18, 1909. He was in a Pittsburgh orphanage in 1916-1917. On August 12, 1918, when he was not yet nine years old, he was committed for an indeterminate period to Polk State School as an imbecile. He was released two years and one month later, September 10, 1920. On October

31, 1921, before he was twelve, he was again committed for an indeterminate period to the Thorn Hill School on a charge of larceny. It does not appear how long he may have been detained prior to that commitment while juvenile delinquency proceedings were pending against him. He remained at Thorn Hill for four and one-half years except for a two-month interval of unsuccessful parole. Upon his release from Thorn Hill he was at large for approximately a year, between the ages of 16½ and 17½. On July 21, 1927, he was once more committed—this time to the Pennsylvania Training School at Morganza, Pennsylvania—on a charge of breaking and entering. He emerged from Morganza three and one-half years later (there was a short parole interruption at some point during this sentence) on December 18, 1930, his twenty-first birthday. On the same day occurred the alleged crimes for which he is presently confined.

Arrest, Trial, Plea and Sentence. Palmer was arrested on December 20, 1930, and held in No. 6 Police Station Pittsburgh. His petition for habeas corpus filed in the present proceedings alleged, without contradiction by the answers, that the arresting officers told him he was charged with "breaking and entering the Leaders Dry Goods Store on Frankstown Avenue" (R. 3, 26-27). An information lodged by Police Inspector Kirley on December 22, 1930 (R. 8-9), charged Palmer and others with two robberies committed on December 18, 1930, one against David Brinn, the other against Peter Rosella. No preliminary hearing was held until December 23, 1930, three days after the arrest (R. 9). The petition for habeas corpus alleges (Par. 6, R. 3) that Palmer was advised at the magistrate's hearing that he was charged with breaking and entering and that he was never thereafter apprised of any other charge. The District Attorney's answer does not con-

trovert this allegation, but merely states the fact, noted above, that the written information or complaint filed by Police Inspector Kirley on December 22 charged Palmer and the others with the Brinn and Rosella robberies (R. 8-9). Palmer was remanded to the Allegheny County jail where he remained until his trial (Pars. 2 and 3 of the petition, R. 2-3).

On January 9, 1931, the Grand Jury returned indictments against Palmer, Steve Conti and Clifford Mason, charging them jointly with armed robbery in the Brinn and Rosella affairs (R. 20-23). On February 18, 1931, Palmer was arraigned, without counsel or offer of counsel. He did not receive copies of the indictments nor were they shown or read to him (Par. 7 of the petition, R. 3). The district attorney informed the court that "the defendant wishes to plead guilty." The court inquired "Do you plead guilty to this charge?" Palmer answered "Yes", having in mind the charge of breaking and entering Leaders Dry Goods Store (Pars. 3 and 4 of the petition, R. 3). The district attorney's answer does not directly contradict these allegations as to Palmer's misunderstanding of the charge. The answer refers to the "records" in Nos. 23 and 24 O and T, January Sessions, 1931, which are said to "clearly indicate" that Palmer pleaded to "specific" charges. The answer then sets forth excerpts from the indictments "to which the relator pleaded guilty" (R. 7-8). The immediately following averment of the answer shows what was meant by the records which "clearly show" that Palmer pleaded guilty to the Brinn and Rosella robberies: the *court clerk* had endorsed on the back of each indictment a notation that the accused had pleaded guilty (R. 8, 21, 23). This, of course, is no contradiction of Palmer's allegation that, without having the indictments read to him and without being informed of their contents, he indicated a willingness to plead guilty because he believed, as the ar-

resting officers had told him, that he was being prosecuted for breaking and entering Leaders Dry Goods Store. The allegation of the petition for habeas corpus that Palmer did not know of the robbery charges until he learned of them during his psychological examination after his arrival at the Western State Penitentiary (R. 3) is nowhere denied.

As previously stated, Palmer was sentenced to five to fifteen years and a fine of 6¼ cents on indictment No. 24 (Rosella), and a like sentence on No. 23 (Brinn), service of the latter sentence to begin on expiration of the former (R. 6, 21, 23). Conti, who was represented by counsel, pleaded not guilty and was acquitted on May 7, 1931 (R. 21, 23, 24). The indictments were dismissed as to Mason on motion of the District Attorney on February 3, 1936, "by reason of no evidence as to Clifford Mason" (R. 21; cf. R. 23). Petitioner served eleven years on the first sentence before he was "paroled" in order to permit him to start serving the second sentence (R. 5). He was paroled under the second sentence on September 19, 1947, but was taken into custody again a year and one-half later and recommitted, not for any criminal act, but as "a violator of parole rules", viz., lack of a place of employment (Par. 9 of the petition for habeas corpus, R. 3, 25; Par. 4 of the warden's answer, R. 5). The sentence he is presently serving will not expire until August 26, 1957 (Par. 3 of the warden's answer, R. 5).

The Habeas Corpus Proceedings. Palmer was not represented by counsel at any stage of the present habeas corpus proceedings prior to the assignment of counsel by this Court after certiorari had been granted. He mailed his petition for habeas corpus to the Court of Common Pleas of Allegheny County. It was filed as of October 11, 1949, on which day a rule issued requiring the warden and the district attorney to show cause why habeas corpus should not issue (R. 2). Although the rule was returnable on

October 20, answers were not filed until December 8, 1949 (R. 1, 4, 6). It does not appear that the answers or copies thereof were ever delivered or shown to the petitioner, and petitioner specifically denied having seen them, in his brief in the Superior Court of Pennsylvania (R. 25). On the same day that the answers were filed, and without a hearing, County Judge Rowand filed his opinion and order denying the writ (R. 10-13). Judge Rowand held that Palmer, being twenty-one at the date of his trial and having been "in trouble" before, was not "as ignorant of criminal proceedings as he now claims" (R. 11), but that, "in any event", there was no obligation to furnish counsel in a non-capital case (R. 12). The Superior Court affirmed in a per curiam opinion, on substantially the same grounds (R. 14-16). The Supreme Court of Pennsylvania denied, without opinion, a petition for allowance of appeal from the Superior Court (R. 30).

Since jurisdiction of the Supreme Court of Pennsylvania is "imperative" where a substantial constitutional question is presented—*Commonwealth* v. *Caulfield*, 211 Pa. 644, 61 Atl. 243; cf. *Boyle's License*, 190 Pa. 577, 42 Atl. 1117 and *Commonwealth* v. *Gardner*, 297 Pa. 498, 147 Atl. 527—the dismissal of the petition for allowance of appeal constitutes a final disposition on the merits, and not a mere discretionary refusal to exercise the power of review. *Uveges* v. *Pennsylvania*, 335 U.S. 437; *Tumey* v. *Ohio*, 273 U.S. 510, 515; see Stern and Gressman, Supreme Court Practice (1950) 74-75; Wolfson and Kurland, Jurisdiction of the Supreme Court (1951) 93-94. It is presumed, in the absence of an opinion of the Supreme Court of Pennsylvania, that that Court considered the Federal constitutional issues raised by the petitioner at every stage of the proceedings. *Townsend* v. *Burke*, 334 U.S. 736, 737, footnote 1; *Gryger* v. *Burke*, 334 U.S. 728, 729, footnote 2; *cf. Williams* v. *Kaiser*, 323 U.S. 471, 478. There is no question

in this case as to the scope of the issues that were passed upon by the Supreme Court of Pennsylvania (cf. dissenting opinions in the *Uveges* case, *supra*) because the petition for allowance of appeal explicitly claimed the protection of the Fourteenth Amendment, and incorporated the petition for habeas corpus and the brief filed in the Superior Court, reiterating constantly the claimed denial of Federal due process (R. 18). *Cf. Gibbs* v. *Burke*, 337 U.S. 773, 779 ("the Federal question was adequately if inartistically raised"). It is not questioned that habeas corpus was the proper method of testing the constitutionality of Palmer's conviction. See *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41, 24 A. 2d 1; *Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337, 19 A. 2d 464; *Gibbs* v. *Burke*, 337 U.S. 773; 779; *Uveges* v. *Pennsylvania*, 335 U.S. 437, 439. The propriety of Palmer's continued imprisonment is therefore squarely before this Court on the merits.

Specification of Errors

The Supreme Court of Pennsylvania erred:

1. in holding that due process did not require the trial judge to offer or provide counsel to a feeble-minded 21 year old youth charged with aggravated robberies, in the circumstances of this case.

2. in upholding the dismissal, without hearing, of a petition for habeas corpus, where the petition alleged that the petitioner was misled by the police and other officials into pleading guilty to robberies with which he had no connection, and the accused, not having the assistance of counsel nor copies of the indictment, believed himself to be charged with a different, unrelated, lesser offense.

Summary of Argument

It is settled by the decisions of this Court that due process requires a state criminal court to tender the assistance of counsel to one accused of serious offenses and incapable, by reason of youth, inexperience, mental deficiency or otherwise, of defending himself adequately.

Petitioner Dominic Palmer was manifestly incapable of coping with two complicated indictments charging aggravated robberies for which he could have been sentenced to 40 years' imprisonment and was actually sentenced to a maximum of 30. He was barely 21 years old at the time of his trial, had been confined at one time as an "imbecile", and had been in and out of mental and correctional institutions between the ages of 8 and 21. The undenied allegations of the petition state that Palmer was told, at the time of arrest and at the magistrate's hearing, that he was charged with breaking and entering Leaders Dry Goods Store. In fact, he was indicted together with two other men for aggravated robberies alleged to have been perpetrated on one Brinn and one Rosella. No copies of the indictments were provided, nor were they read nor explained to him. No counsel was offered or provided. In a proceeding lasting "a minute, more or less" the District Attorney told the trial judge that Palmer wished to plead guilty and Palmer assented, believing he was pleading to the Leaders Store charge. He did not learn the truth until his arrival in the penitentiary.

The answers to the petition, without directly contradicting any of the foregoing, merely aver that the "record", consisting of the court clerk's entry of the plea of guilty on the back of the indictments, shows that Palmer pleaded guilty to "specific" charges. The petition was dismissed without hearing.

The case is governed by *Uveges* v. *Pennsylvania*, 335 U.S. 437. It is a plain and shocking violation of fundamental decencies in criminal proceedings.

Argument

I

THE FAILURE TO PROVIDE COUNSEL AND THE ACCEPTANCE OF A GUILTY PLEA, UNDER ALL THE CIRCUMSTANCES OF THIS CASE, DENIED PETITIONER DUE PROCESS OF LAW.

The present case is hardly to be distinguished from *Uveges* v. *Pennsylvania*, 335 U.S. 437. That case arose on habeas corpus in Allegheny County, Pennsylvania, as did this one. There a youth of 17 was charged with four burglaries, pleaded guilty without offer or provision of counsel, and was sentenced to 20-40 years. Here, a feeble-minded youth of 21 was indicted on two counts of armed robbery and sentenced to 10-30 years. There the defendant had previously been prosecuted for burglary, and served a ten month sentence. Here, defendant had served a term in the reformatory for breaking and entering, and before that had been in and out of a series of institutions for dependent, delinquent and mentally defective children. There, as here, the Court of Common Pleas of Allegheny County subsequently denied a petition for habeas corpus without a hearing, despite the failure of the answers to contradict material allegations of the petition which, if believed, entitled the prisoner to his release. Here, as there, the perfunctory dismissal of the petition for habeas corpus was upheld first by the Superior Court and then by the Supreme Court of Pennsylvania.

While the instant case might, therefore, be reversed on the controlling authority of the *Uveges* case, petitioner submits below a more detailed analysis of the facts and the relevant law. We take as our starting point Mr. Justice

Reed's statement in the *Uveges* case of the law as to defendant's right under the due process clause to assistance of counsel in state prosecutions:

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See *Bute* v. *People of Illinois*, 333 U.S. 640, dissent, 677-679, 68 S. Ct. 763, 782, 783. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See *Betts* v. *Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595. Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.
>
> "The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trial. The application of the rule varies as indicated in the preceding paragraph.
>
> "Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice

of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing."

See also *Gibbs* v. *Burke*, 337 U.S. 773, 780.

II

PALMER'S YOUTH, IGNORANCE AND MENTAL DEFICIENCY RENDERED HIM INCAPABLE OF ADEQUATELY DEFENDING A SERIOUS CRIMINAL CHARGE; TRIAL WITHOUT COUNSEL WAS "SO APT TO RESULT IN INJUSTICE AS TO BE FUNDAMENTALLY UNFAIR".

In dealing with the deeply troubling problem of defining the situations which justify intervention by this Court to guarantee assistance of counsel in state prosecutions, no circumstance has been more consistently relied upon than the intellectual incapacity of the defendant, as evidenced by his youth, inexperience, lack of education or mental defect. *Powell* v. *Alabama*, 287 U.S. 45, 69; *House* v. *Mayo*, 324 U.S. 42, 45 ("in his twenties, uneducated and a stranger in the town"); *Carter* v. *Illinois*, 329 U.S. 173, 178 (relief denied absent allegations on "maturity or capacity of comprehension"); *Marino* v. *Ragen*, 332 U.S. 561; *De Meerleer* v. *Michigan*, 329 U.S. 663; *Bute* v. *Illinois*, 333 U.S. 640, 671 (relief denied absent claim of "abnormality, intoxication, or insanity"); *Wade* v. *Mayo*, 334 U.S. 672, 683-4 ("age,

ignorance or mental capacity"); *Uveges* v. *Pennsylvania*, quoted *supra; Gibbs* v. *Burke, supra.*

The only case in which this Court has refused to intervene when a youthful defendant pleaded guilty without counsel is *Canizio* v. *New York*, 327 U.S. 82, where the defendant actually had counsel after his plea was entered and before sentence. A majority of the Court were satisfied that the trial judge, in obedience to New York statutes, had advised petitioner of his right to counsel at the time of his arraignment, that defendant's counsel had actively represented his client, and that he could have withdrawn the plea of guilty without prejudice had he considered that advisable in his client's interest. Disregarding the *Canizio* case, therefore, the Court's decisions against the claimed constitutional right have all involved men not less than 30 years old, insofar as age may be determined from the opinions. *Gryger* (34) v. *Burke*, 334 U. S. 728; *Bute* (57) v. *Illinois*, 333 U. S. 640; *Betts* (43) v. *Brady*, 316 U. S. 455; *Carter* (30) v. *Illinois*, 329 U. S. 173; *Foster* (34) v. *Illinois*, 332 U. S. 134. In none of these cases was there any suggestion that the defendant was mentally deficient.

On the record of the instant case petitioner's mental capacity was clearly inadequate to enable him unaided to cope with the greatest problem of his lifetime—two complicated indictments on which he might be sentenced to as much as 40 years' imprisonment. Par. 2 of Palmer's petition for habeas corpus recited his confinement in the Polk State School as "mentally abnormal". (R. 2). The warden's answer discloses that Palmer was classified at Polk as an "imbecile". (R. 5). An imbecile is intermediate between idiot and moron in the range of the "feeble-minded". "Feeble-minded" is a generic term that includes all mental defects "arising from arrested or imperfect mental development, as the result of which the person so affected is incapable of competing on equal terms with his normal fel-

lows or managing himself or his affairs with ordinary prudence." The imbecile's development "does not exceed that of a normal child of about seven years." He can be "materially improved by training, but not sufficiently to take a place in the world." See Louttit, Clinical Psychology (1936) 98; 12 Encyclopaedia Britannica (14th Ed.) 387. "Morons", the highest classification of the feeble-minded, "can usually learn to read and write but few attain more than the fourth grade. With a little supervision they can perform simple, routine work such as operating automatic machines. Those of the lower grades can wash dishes, run errands, etc. They are not capable of consistent and sagacious planning and do not exercise ordinary prudence in looking after their affairs." Noyes, Modern Clinical Psychiatry (1948) 430.

Although Palmer was eventually released from Polk (the record does not disclose the circumstances) the continuance of his mental disability to the time of the robbery trial is adequately averred in Par. 2 of his petition, in which he characterized himself as an "irresponsible" boy at the time of his arrest in December 1930. It is well-settled that prisoners' petitions are not to be "meticulously" scrutinized for pleading imperfections. *Gibbs* v. *Burke*, 337 U.S. 773, 779; *Tomkins* v. *Missouri*, 323 U.S. 485, 487. Palmer's pleading on this point is adequately illuminated by the reference in his brief below to the records of the Psychology Department of the Western State Penitentiary, showing that upon his admission to that institution in 1931, he had a mental age of 11 and was classified as feeble-minded, with an I.Q. of 74 (R. 25). Considering the crucial bearing of this information on the legality of Palmer's imprisonment, and the fiduciary obligation of public officials to the courts and to those in their custody who are incapable of self-protection, it might have been fairer for the warden or the district attorney to inform the habeas corpus court just

what Palmer's mental condition was in 1931, as revealed by the penitentiary records. It may be assumed that if those records had shown that Palmer was of normal intelligence upon admission, the answers would not have failed to emphasize that fact. Instead, the answers are silent on that subject, ignoring petitioner's allegation that he was at the time of his trial an irresponsible boy who had been committed to Polk State School "because he was mentally abnormal". (R. 2).

The Pennsylvania Superior Court attempted to meet the issue of Palmer's mental defect by referring to the "comprehensive and legalistic brief" bearing petitioner's signature, as proof of his intellectual capacity. However, it is common knowledge that such papers are drawn by specially articulate and sometimes legally trained convicts, who come to be known as "prison lawyers". See Mr. Justice Frankfurter's opinion in *Williams* v. *Kaiser*, 323 U.S. 471, 484; *Rice* v. *Olson*, 324 U.S. 786, 787. Even if the brief were attributed to Palmer, it would bear only on his mental capacity in 1950, almost 20 years after the trial at which he says he was incapable of making an adequate defense. Pennsylvania's post-conviction review procedure would be vulnerable under the 14th Amendment if Palmer's 1931 mental capacity, the central factual issue in this case, can be adjudged on the basis of an appellate brief filed on his behalf 19 years later, after his habeas corpus petition had been dismissed without hearing. While a state is free to select its own procedures for post-conviction review, it must as a matter of due process afford some opportunity to establish basic constitutional or jurisdictional defects in the sentencing process. This means a hearing on controverted issues of material fact. *Smith* v. *O'Grady*, 312 U.S. 329; *Hawk* v. *Olson*, 326 U.S. 271; cf. *Walker* v. *Johnson*, 312 U.S. 275.

Both the Common Pleas and the Superior Court relied upon Palmer's previous court experiences as evidence of

the likelihood that he understood the charges against him and the significance and consequences of a plea of guilty. Unquestionably, previous experience in criminal proceedings is a factor to be weighed in this connection, where there is nothing to suggest that the experience was irrelevant and that the capacity of the person involved to learn from experience was unimpaired. That was not the case here. Not only was Palmer's mind stunted; but the very series of thieving episodes which led to his continual return to custody, culminating in the admitted Leader's Dry Goods offense committed on the very day of his release from Morganza, indicates a mind very nearly incapable of learning from experience.

Even a sound mind could not have learned from Palmer's previous experiences much that would have stood him in good stead on February 18, 1931. He had had only a single encounter with an ordinary criminal court, and that three and one-half years before, at the age of 17½ (R. 6). Before that, owing to his extreme youth, all his contacts with the law must have been in the juvenile court, a tribunal distinguished from the ordinary criminal court in many vital respects. The juvenile court deals with dependent, neglected and delinquent children as part of a single responsibility to protect and rehabilitate. In those tribunals there are no jury trials, and lawyers rarely appear. There is no "conviction" or "guilt" even if the child is found to have been engaged in delinquent conduct which, in an adult, would be criminal. See Pennsylvania Juvenile Court Act of 1903 as amended, 11 Purd. Pa. Stat. Ann. (1930) Secs. 71 et seq., and special provisions as to the "sole jurisdiction" of the Allegheny County juvenile court in 17 Purd. Pa. Stat. Ann. (1930) Sec. 653; *Commonwealth* v. *Fisher*, 213 Pa. 48, 62 Atl. 198 (1905); Sutherland, Principles of Criminology (1947 ed.) chapter 17.

It may be noted further that Palmer's single previous ex-

perience in the ordinary criminal court was on a charge of "breaking and entering". Breaking and entering was the charge to which Palmer thought he was pleading guilty in 1931, having been so informed by the arresting officers, according to the uncontradicted allegations of the petition for habeas corpus. Never before, so far as the record goes, had Palmer been charged with an offense like robbery, involving personal violence and arms. The record is silent as to whether the 17 year-old Palmer was represented by counsel in the 1927 proceeding for breaking and entering, or whether, as in the present case, he pleaded guilty without counsel or trial, all in a matter of minutes. By Act of June 15, 1939, Pennsylvania raised the juvenile age limit from 16 to 18, indicating the present legislative judgment that the ordinary criminal court is no place for a boy of 17. 11 Purd. Pa. Stat. Ann. (1949 Supp.) Secs. 243(2) and 269-202(f).

It is submitted that the petitioner's previous experience in criminal matters was meager and largely irrelevant to the problems he faced on February 18, 1931. Such experience would not have availed a person of normal intelligence, much less a feeble-minded young man most of whose life had been spent in institutions. Even mature individuals of normal intelligence have not in all circumstances shown themselves or been regarded as qualified to conduct their own defense merely because of previous encounters with the law. See *Townsend* v. *Burke*, 334 U.S. 736; *Gibbs* v. *Burke* ("in his thirties"; 8 previous convictions, 9 acquittals, discharges and no bills). Wade, an 18 year-old apparently normal boy who was convicted of breaking and entering, was held by this Court to be incapable of adequately representing himself "even in a trial which apparently involved no complicated legal questions", although he had had previous court experiences. *Wade* v. *Mayo*, 334 U.S. 672, 683.

III

THE ROBBERY CHARGES WHICH PALMER FACED WERE SO SERIOUS AND COMPLEX AS TO MAKE ASSISTANCE OF COUNSEL A CONSTITUTIONAL REQUISITE.

It is defendant's critical "need" for assistance of counsel that is the ultimate criterion of his constitutional right to have it. This theme recurs again and again in the opinions and formulations of the constitutional rule. *Williams* v. *Kaiser*, 323 U.S. 471, 483; *Rice* v. *Olson*, 324 U.S. 786, 789; *Hawk* v. *Olson*, 326 U.S. 271, 278; *Von Moltke* v. *Gillies*, 332 U.S. 708, 721; *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441-2; *Gibbs* v. *Burke*, 337 U.S. 773, 781. Need is obvious when the defendant is young, ignorant and handicapped. Even the simplest legal case is more than immature and feeble minds can cope with. But when a case involves extreme penalties and complex issues of law foreign to the lay understanding, the need becomes imperative not merely for the handicapped but for any defendant. The relative gravity and complexity of the charge is adverted to in the following cases among others as a guiding consideration in determining when the Constitution requires assistance of counsel: *Williams* v. *Kaiser*, *Hawk* v. *Olson*, *Bute* v. *Illinois*, *Wade* v. *Mayo*, *Von Moltke* v. *Gillies*, and *Uveges* v. *Pennsylvania*, all previously cited.

Under the law of Pennsylvania at the time of Palmer's trial and plea, aggravated robbery was punishable by fine up to $5,000 and imprisonment "by separate or solitary confinement at labor, for any term of not more than twenty years". See Appendix. This penalty exceeded that prescribed for second degree murder, inasmuch as the latter, although likewise carrying a 20-year maximum, did not require penal servitude "at labor", nor was any fine imposed. Sec. 76 of the Act of March 31, 1860, P.L. 385 as amended, 18 Purd. Pa. Stat. Ann. (1930) Sec. 2223. The

twenty-year maximum for aggravated robbery may be compared with the 5-year penalty provided for simple robbery, the 15-year maximum for rape, and the ten-year maximum for burglary. 18 Purd. Pa. Stat. Ann. (1930) Secs. 2891, 2261, 3041. The sentence actually imposed upon Palmer, 30-year maximum, and the 20 years already served, may be compared with the average time served in Pennsylvania penitentiaries for *first degree murder*, which is 15 years according to an unpublished study prepared at the University of Pennsylvania Law School in 1951 for the Royal Commission on Capital Punishment. The study was based on statistics for the past 50 years supplied by the state penitentiaries. It is evident that, next to life itself, the gravest issues were at stake in Palmer's trial of February 18, 1931.

And the outcome turned on extremely complicated legal questions. The importance of the distinction between simple and aggravated robbery, in terms of a choice between a maximum imprisonment of 5 or 20 years, has already been adverted to. It will be seen from the statute reproduced in the Appendix that robbery may be aggravated either by the circumstance that the robber was "armed with an offensive weapon or instrument" or that he acted "together with one or more person or persons". The indictments in this case charged both. (R. 19-22). As to being armed, the indictments charged that revolvers were used, but do not say that the revolvers were loaded. It is generally known that hold-up bands and individual robbers often seek to forestall the possibility of a death sentence for a killing "accidentally" occurring in the commission of robbery, by using and insisting that comrades use unloaded guns. It is an open question in Pennsylvania whether an unloaded revolver is an "offensive weapon". At least one state has reached a negative conclusion on this point. *Luitze* v. *State*, 204 Wis. 78, 234 N. W. 382; see Annotation,

74 A.L.R. 1206; cf. *Price* v. *United States*, 156 Fed. 950 (9th Cir. 1907); *People* v. *Sylva*, 143 Calif. 62, 76 Pac. 814. Some of these authorities indicate that the issue might turn on whether the weapon was merely being pointed at the victim or whether the circumstances were such that the robber was in a position to use the gun as a club.

As for the aggravating circumstance of acting "together with" other persons, this invokes the law of conspiracy and vicarious responsibility, with which this Court has wrestled on more than one occasion. See *Von Moltke* v. *Gillies*, 332 U.S. 708, 721-728. Since a conviction could be rested either on the use of "offensive weapons" or the participation of accomplices, Palmer, if he was involved in these robberies at all, which is denied, must have had to appraise the state's case not only against himself, but against Conti and Mason, for conspiracy requires the guilty participation of at least two. *Gebardi* v. *United States*, 287 U.S. 112; *Delaney* v. *State*, 164 Tenn. 432, 51 S. W. 2d 485 (1932). The importance of this in the present case can be gauged from the fact that Conti was acquitted after a trial, while the indictment against Mason was dismissed for want of evidence on motion of the district attorney. (R. 21, 23). Of course, in view of Palmer's persistent contention that he had nothing to do with the robberies (R. 24), had never heard of the charges before he reached the penitentiary (Par. 5 of the petition, R. 3, not specifically contradicted by the answers), and thought he was pleading guilty to breaking and entering Leader's Store (Pars. 3 and 4 of the petition, R. 3, not specifically contradicted by the answers), it is almost academic to talk of his appraising anybody's case—there was no occasion for him to address even his limited faculties to the problems which the indictments raised.

A third complication in the case involves the law of attempt. The district attorney, the warden and the Court

of Common Pleas in its opinion on habeas corpus refer to Indictment No. 24 (Rosella robbery) as "attempted robbery". (R. 5, 7, 10-11). The general difficulties of the law of attempt are hardly less than those of conspiracy: Was the means employed by the actor "reasonably adapted" to the end? Did the overt act come "dangerously close" to accomplishment or was the actor still engaged in "preparation"? Did the act "unequivocally manifest" the criminal intent? Was failure attributable to "legal impossibility" or only "factual impossibility". Is successful completion of the crime a bar to conviction for the attempt? These and other obscurities and contradictions have made the subject a favorite of commentators. See generally materials collected in Michael & Wechsler, Criminal Law and Its Administration (1940) chapter V. But in Pennsylvania and in this case these difficulties are compounded. Pennsylvania has no general statutory provision for the punishment of attempt. By virtue of the common law—still in effect in this state notwithstanding the enactment of so-called Penal Codes [1]—attempts are punishable, but how severely is in some doubt. By a process of judicial legislation, the courts in two cases have indicated that attempts cannot be punished *more* severely than the accomplished crime; and it has been observed that "There are indications in our Penal Code of 1860 of a legislative intent to punish attempts with less severity than is prescribed for the completed offense." *Commonwealth ex rel. Swisher* v. *Ashe*, 145 Pa. Super, 454, 458, 21 A. 2d 479 (1941); *Cavalucci* v. *Smith*, 154 Pa. Super. 613, 36 A. 2d 732 (1944). Perhaps the greatest source of confusion in connection with the attempt question is the fact that the robbery statutes them-

[1] See Sec. 178 of the Act of March 31, 1860, P.L. 382. 425, 18 Purd. Pa. Stat. Ann. (1930) Sec. 3741; cf. Sec. 1101 of the Penal Code of 1939, 18 Purd. Pa. Stat. Ann. (1945) Sec. 5101; *Commonwealth* v. *Gettis*, 166 Pa. Super. 515, 72 A. 2d 619 (1950).

selves cover "assault with intent to rob", and punish it just like any other robbery. Whether this is or is not identical with the common law "attempted robbery" cannot be known with any certainty.

But while it would challenge the ingenuity of a Philadelphia lawyer to pick his way through these subtleties, one thing can be said with reasonable assurance. Even if somebody in the court on February 18, 1931, recited that the charges were "robbery and attempted robbery", the distinction could hardly have meant anything to this weak-minded youth except that attempted robbery was probably a lesser offense carrying a milder penalty. On the contrary, for reasons not disclosed, Palmer was given the same sentence on No. 24, the "attempt", and ordered to serve that sentence before the sentence imposed for the allegedly successful robbery of Brinn, No. 23.

From Palmer's point of view at his trial—and from no other is it fair to judge the need for legal assistance—even such distinctions as that between robbery on the one hand and larceny, breaking and entering, or burglary were probably indistinct or non-existent. He had admitted breaking and entering Leader's Dry Goods Store, and had been told by the police that this was the charge against him. It is doubtful that any warning would have sounded in his dim comprehension even if he had heard someone in court ask him if he wished to plead guilty to "robbery", when he was prepared to plead guilty to a breaking and entry. The laity knows all acquisitive crimes as "robbery". Even educated persons will speak of a neighbor's house as having been "robbed" when no one was present, although a lawyer would realize that only burglary could have been committed.

The last difficulty of substantive law which should be called to the Court's attention is the defense of insanity. Considering Palmer's known mental defect and the repeti-

tive and apparently compulsive character of his thefts, alert counsel might well have interposed a plea of not guilty by reason of insanity, especially since Pennsylvania law recognizes "irresistible impulse" as an insanity defense. *Commonwealth* v. *Mosler*, 4 Pa. 264 (1846) and *Commonwealth* v. *Calhoun*, 238 Pa. 474, 86 Atl. 472 (1913); but see *Commonwealth* v. *Schroeder*, 302 Pa. 1, 152 Atl. 835 (1930).

Finally, it is clear that assistance of counsel was essential to basic fairness in determining the sentence to be imposed on the defendant. Defense counsel would have elicited from Palmer, from his record, and from the witnesses all the circumstances of mitigation, of relative responsibility for the alleged joint misdeed, of the need for medical rather than punitive treatment, etc. This Court put the matter as follows in *Carter* v. *Illinois*, 329 U. S. 173, 178:

> ". . . A trial court may justifiably be convinced that a defendant knows what he is about when he pleads guilty and that he rightly believes that a trial is futile because a defense is wanting. But the imposition of a sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. . . ."

See also *Von Moltke* v. *Gillies*, 332 U.S. 708, 721; *Townsend* v. *Burke*, 334 U.S. 736 (prejudicial error in sentencing); *Canizio* v. *New York*, 327 U.S. 82 (presence of counsel at sentencing saved validity of proceedings); *Bute* v. *Illinois*, 333 U.S. 640, 670 (referring to the fact that the sentence

imposed was mandatory; i.e. no question of discretion here where assistance of counsel might have helped).

IV

THE CIRCUMSTANCES OF PALMER'S TRIAL DEMONSTRATE ACTUAL PREJUDICE DUE TO LACK OF COUNSEL.

1. Palmer's petition for habeas corpus averred, and the answers did not deny, that the arresting officers told him he was being charged with breaking and entering, and that he thought he was pleading guilty to such a charge. A representation by the arresting officers obviously would have contributed to the likelihood of his misunderstanding the charges against him and the consequences of a guilty plea. Thus, aside from all question of defendant's youth and mental handicap, we have here the problem of the uncounseled accused being misled by prosecution officials. It was such a misunderstanding attributable to enforcement officers that moved this Court in *Smith* v. *O'Grady*, 312 U.S. 329, 332-3 and *Von Moltke* v. *Gillies*, 332 U.S. 708. The Court has been especially sensitive to accused's misunderstanding the nature of the charge against him, for "real notice of the true nature of the charge against him [is] the first and most universally recognized requirement of due process". *Smith* v. *O'Grady*, *supra* at 334; cf. *Carter* v. *Illinois*, 329 U.S. 173, 174 ("Inherent in the notion of fairness is ample opportunity to meet an accusation"); *Cole* v. *Arkansas*, 333 U.S. 196, 201. In *Bute* v. *Illinois*, 333 U.S. 640, 670 the Court pointed out that there was no claim of failure to understand the charges. The legality of the detention in *Quicksall* v. *Michigan*, 339 U.S. 660 was affirmed only after a trial on the issue of defendant's understanding of the charges and the consequences of his plea, even though the original trial record recited the lengths to which the sentencing judge had gone to inform the defendant fully as to the charge.

Counsel would have prevented Palmer's misunderstanding the charges against him.

2. Lack of counsel likewise prejudiced the defendant because of the failure to raise the question of his illegal detention for three days between arrest and preliminary hearing. (R. 8-9) No contention can be made on the present record that the circumstances of this detention alone deprived the sentencing court of jurisdiction; but illegally prolonged detention is surely suggestive enough of the inquisitorial purpose of the police to support an inference that alert counsel would have looked into the matter to see if by chance the plea of guilty were not the result of the suction process of interrogation, a process not unknown in Pennsylvania. See *Turner* v. *Pennsylvania*, 338 U.S. 62; *Agoston* v. *Pennsylvania*, 340 U.S. 844; *Johnson* v. *Pennsylvania*, 340 U.S. 881; cf. *Commonwealth ex rel. Sheeler* v. *Burke*, 367 Pa. 152, 79 A. 2d 654 (1951). It is significant that Palmer was not charged with robbery until two days after his arrest.

3. Mere inspection of the indictments discloses the unfairness of putting this defendant to trial without counsel. These documents (R. 20-23) would be well-nigh unintelligible to most people. They appear to have been copied from forms containing two counts, the first for aggravated robbery, the second for receiving stolen goods. Opening with the archaic language of 18th century pleading, Count 1 of Indictment No. 23 proceeds to charge that Palmer, Conti and Mason

> ". . . being then and there armed with offensive weapons, to-wit; revolcers, with force and arms, in and upon one David Brinn feloniously did make and assault, and did then and there feloniously beat, strike and ill use the said David Brinn and do violence to said David Brinn with intent then and there to feloniously rob the said David Brinn *and* the sum of twenty dollars, lawful money of the Government of the United States, of the goods, moneys, chattels and property of the said David Brinn, from the person of the said David Brinn, feloniously did rob, seize, steal, take and

carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania. . . ." (Italics added) (R. 20)

While the general purport of this is decipherable, the precise structure and meaning are so hard to follow that the district attorney himself seems to have thought it necessary to substitute the word "of" for the word "and" which is underlined in the above quotation. (See R. 7.) On the other hand Count 1 of Indictment No. 24 uses both words. (R. 22). It requires at least two close readings through the inversions and parentheses of Count 2 of each indictment to reveal that it deals with receiving the same stolen property which the defendants are accused of stealing in Count 1. There is the added confusion in Indictment No. 23 (the Rosella "attempted robbery") that the pleader repeats all the allegations of stealing and receiving, indicating the distinction from a completed robbery only by failing to state what was stolen or received. Cf. the references to the "simple terms" and "intelligibility" of the indictments in *Bute* v. *Illinois*, 333 U.S. 640, 645, 670.

4. The esoteric language of the indictments lend added significance to another circumstance of prejudice to Palmer. Pennsylvania is one of the very few states without statutory provision for furnishing copies of indictments to the accused at any stage of the proceedings. See notes to Sec. 85 of the Code of Criminal Procedure of the American Law Institute (1931) 603-607. This Court has often indicated the importance of the timely availability of copies of the charge, noting that such copies were denied in *Smith* v. *O'Grady*, 312 U.S. 329, 333, furnished belatedly in *House* v. *Mayo*, 324 U.S. 42, 45, furnished in *Bute* v. *Illinois*, 333 U.S. 640, 643, footnote 3; cf. *Hawk* v. *Olson*, 326

U.S. 271, 279 (no showing that "the charge was served upon petitioner well in advance of the trial"). In the counties with which petitioner's counsel is familiar it is not the practice even to read the indictments to the accused at arraignment, except in murder cases. It is significant that the district attorney's answer made no claim that the indictments were read or explained to Palmer. It is evident that Palmer had no opportunity to learn from inspection or study of the indictments what the charges against him were. A lawyer would, of course, have informed himself and his client of the precise accusation.

Moreover, Pennsylvania makes no statutory provision such as is found in other states imposing a duty on the trial judge to advise as to the nature of the charges and the consequences of a guilty plea. This Court has often pointed to the existence of such protective legislation as some assurance that the uncounseled defendant received decent guidance from the bench. *Bute* v. *Illinois*, 333 U.S. 640, 670-671; *Foster* v. *Illinois*, 332 U.S. 134, 138. *Gibbs* v. *Burke*, 337 U.S. 773, 781 refers to the failure of one Pennsylvania judge to give "adequate judicial guidance or protection" to a defendant representing himself. *Quicksall* v. *Michigan*, 339 U.S. 660 and *Carter* v. *Illinois*, 329 U.S. 173, illustrate the saving grace of judicial protection of the accused. *De Meerleer* v. *Michigan*, 329 U.S. 663, and *Von Moltke* v. *Gillies*, 332 U.S. 708 show the fatal defect of letting an uncounseled defendant blunder into an unconsidered guilty plea.

5. Far from affording Palmer the judicial protection which might have made up for lack of counsel, the trial judge failed to accord Palmer one of the few protections which the Pennsylvania legislature did charge its courts to provide in such situations. Section 308 of the Mental Health Act of

1923, 50 Purd. Pa. Stat. Ann. (1931) Sec. 48, provides in part as follows:

> "When, on the production or appearance of any person charged with criminal offense, or on the production or appearance before the court of such a person under any other circumstances, it shall appear to the court that such person is insane, or in such condition as to make it necessary that he be observed or cared for in a hospital for mental diseases, proceedings for the commitment of such person to such a hospital shall be had . . ."

Disposition of Palmer under this statute, if not plainly the duty of the court on its own motion, in view of Palmer's background, would at least have been urged on the court by counsel, if one had been provided. As previously indicated, also, counsel might have pleaded Palmer not guilty by reason of insanity.

Instead, in a hearing lasting only "a minute, more or less" (Par. 3 of the petition, R. 3, not denied) Palmer was sentenced to a maximum of 30 years imprisonment. The very haste of this proceeding impugns its fairness. See *Powell* v. *Alabama*, 287 U.S. 45; *Smith* v. *O'Grady*, 312 U.S. 329, 334; *Carter* v. *Illinois*, 329 U.S. 173 (no "precipitancy in the acceptance of a plea of guilty"); *De Meerleer* v. *Michigan*, 329 U.S. 663, 665 ("hurried through unfamiliar legal proceedings"). A little more deliberation at least would have characterized Palmer's trial, if he had had a lawyer.

6. The final indication of actual prejudice to Palmer from want of counsel is the discharge of his alleged accomplices. It has already been pointed out that Conti was acquitted by a jury, and the indictment against Mason was nol-prossed for want of evidence. (R. 21, 23). A certain inference arises as to the weakness of the case against Palmer. In any event it has already been shown that Palmer's guilt of aggravated robbery (assuming he was involved at all)

may well have turned on the participation of accomplices —and they were absolved.

Conclusion

It follows from the foregoing that, for want of benefit of counsel, Palmer's trial lacked the fundamental requisites of due process. One may say not merely that "an ingredient of unfairness operated in the process" (*Foster* v. *Illinois*, 332 U.S. 134, 137) but, in the words of *Betts* v. *Brady*, 316 U.S. 455, 473 that it is "offensive to the common and fundamental ideas of fairness and right" that an uncounseled, feeble-minded 21 year-old should have been hurried off to 30 years imprisonment without a word of guidance from the bench or the kind of searching inquiry which alone justifies a court in accepting a waiver of counsel and plea of guilty to a grave charge. *Kercheval* v. *United States*, 274 U.S. 220, 223; *Von Moltke* v. *Gillies*, 332 U.S. 708, 724. Mr. Justice Burton, speaking for the dissenters in the *Von Moltke* case, differed from the majority only because the dissenting justices read the record as establishing that the guilty plea was "long considered and unequivocal", and the waiver of counsel "freely, intelligently and knowingly made". 332 U. S. at 731. No such case is here.

"The importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect." *Hawk* v. *Olson*, 326 U.S. 271, 278. But speculation is unnecessary in this case. It is clear from the record that by the standards which this Court has formulated and by any others that would command the respect of a free world, the petitioner, Dominic Palmer, should be discharged from custody.

Respectfully submitted,

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OCTOBER 11th, 1951.

APPENDIX

Robbery Statutes in Force in Pennsylvania in 1931

18 Purd. Pa. Stat. Ann., Secs. 2891 and 2892

§ 2891. *Robbery and assault and battery with intent to rob*

If any person shall rob another, or shall steal any property from the person of another, or shall assault any person with intent to rob him, or shall, by menaces or by force, demand any property of another, with intent to steal the same, such person shall be guilty of felony, and being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, not exceeding five years. (1860, March 31, P. L. 382, § 102.)

§ 2892. *Robbery with aggravating circumstances*

If any person, being armed with an offensive weapon or instrument, shall rob, or assault with intent to rob, another; or shall, together with one or more person or persons, rob, or assault with intent to rob; or shall rob any person, and at the same time, or immediately before or immediately after such robbery, beat, strike, or ill-use any person, or do violence to such person, the person so offending shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine, not exceeding five thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, for any term of not more than twenty years: Provided, That the provisions of this act shall not apply to any crimes committed before the passage hereof, but all such crimes shall be prosecuted as heretofore under the provisions of the section to which this is an amendment. (1860, March 31, P. L. 382, § 100; 1919, April 18, P. L. 61, § 1.)